No. 97-16

(6)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

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Petition for a Writ of Certiorari Filed July 1, 1997
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO (Columbus)

Civ. A. No. 92-CV-249

SIERRA CLUB
v.
ROBERTSON, ET AL.

RELEVANT DOCKET ENTRIES

No.	Date	Description
1	3/18/92	COMPLAINT (Summons issued) (referred to Mag. Judge Mark R. Abel) (no. pgs: 15) (tl) [Entry date 03/20/92]
6	7/30/92	MOTION of Ohio Forestry Association Inc for leave to intervene as a Defendant. (no pgs: 11 + exhibits) (aq) [Entry date 08/03/92]
14	9/3/92	NOTICE by defendant of filing the administrative appeal record and index to the planning records with attached Declarations of Barbara Timberlake and Robert Ballantyne. Six large binders and 1 folder of publications (located under the desk of Beverly in Clerks Ofc.) () (br)
15	9/4/92	ORDER by Mag. Judge Mark R. Abel granting motion to intervene by Ohio Forestry Association as a Defendant. [6-1] (cc: all counsel) (no pgs: 1) (br) [Entry date 09/08/92]

19	10/15/92	MOTION by defendant Ohio Forestry Assoc for order limiting the scope of review of the Adm. record () (br) [Entry date 10/16/92]
23	11/25/92	AMENDED COMPLAINT by plaintiff Sierra Club (no pgs: 17) (br) [Entry date 11/30/92]
31	3/8/93	ORDER by Judge James L. Graham granting motion for order limiting the scope of review of the Adm. record [19-1], and granting motion in limine to review the Adm. Record [18-1] (cc: all counsel) (no pgs: 21) (br)
34	6/22/93	MOTION by plaintiff Sierra Club to file a second amended complaint () (br) [Entry date 06/23/93]
36	7/23/93	ORDER by Mag. Judge Mark R. Abel granting motion to file a second amended complaint [34-1] (cc: all counsel) (no pgs: 1) (br) [Entry date 07/28/93]
38	8/11/93	MOTION by defendant F Dale Robertson, defendant Edward Madigan, defendant Floyd J Marita, defendant Francis J Voytas, defendant Ohio Forestry Assoc for summary judgment (no pgs: 3) (pl) [Entry date 08/12/93]
39	8/11/93	MEMORANDUM by defendant F Dale Robertson, defendant Edward Madigan, defendant Floyd J Marita, defendant Francis J Voytas, defendant Ohio Forestry Assoc in support of motion for summary judgment [38-1] (no pgs: 80 + exhibits) (pl) [Entry date 08/12/93]

41	8/11/93	Notice by plaintiff Sierra Club of filing supplementation of the administrative record (16 vol. in binder form in pockets located in Bev's cubicle) (br) [Entry date 08/16/93]
42	8/11/93	MOTION by plaintiff Sierra Club for summary judgment () (br) [Entry date 08/16/93]
45	8/19/93	REVISED MOTION by plaintiff Sierra Club for summary judgment () (br)
48	9/22/93	ORDER by Judge James L. Graham setting cross motions for summary judgment [45-1], [42-1], and [38-1] for oral hearing at 9:00 a.m. on 10/28/93 (cc: all counsel) (no pgs: 2) (br)
59	10/28/93	CIVIL MINUTES: Proceeding before Judge James L. Graham; In-court hearing was held on 10-28-93 on the cross motions for sj. A written order will issue as soon as possible. , (cc: all counsel) () (br)
60	3/11/93	ORDER by Judge James L.Graham denying plaintiff's motions for summary judgment [45-1] and [42-1], granting defendants' motion for summary judgment [38-1] dismissing case Judgment to enter for the defendants at plaintiffs costs. (cc: all counsel) (no pgs: 39) (br)
61	3/11/94	JUDGMENT ENTERED as to #60: (cc: all counsel) (no pgs: 1) (br)
62	4/8/94	NOTICE OF APPEAL by plaintiff Sierra Club from Dist. Court decision [61-1] of 3/11/94,

		and the Dist. Court decision [31-1] of 3/8/93 (no pgs: 2) (sm) [Entry date 04/11/94]
63	1/3/95	RULE 11(e) FILED: File to be retained by District Court during appeal. (sm)
--	1/9/95	RECORD CERTIFIED to USCA 6th: 3 volume of pleadings only (sm)
64	1/23/97	INFORMATION COPY of USCA 6th: appeal [62-1]: reverse and remanding to the district court (sm) [Entry date 01/27/97]
65	1/30/97	RENEWED MOTION by plaintiff for summary judgment () (br) [Entry date 01/31/97]
66	4/16/97	ORDER OF USCA 6th: reversing and remanding the Decision of the District Court Appeal [62-1] (no pgs: 1) (sm) [Entry date 04/17/97]
--	5/2/97	APPEAL Record Returned from USCA 6th. (sm)
--	7/28/97	RECEIPT OF SUPREME COURT OF THE US APPEAL NUMBER - Number Assigned: 97-16 (sm)
67	8/26/97	RENEWED MOTION by plaintiff for summary judgment (no pgs:) (wh) [Entry date 08/28/97]
68	9/5/97	NOTICE by plaintiff of substition of Mike Dombeck U.S. Secretary of Agriculture for F Dale Robertson (no pgs: 2) (wh)

69	9/5/97	MOTION by plaintiff for temporary restraining order (no pgs: 8) (wh)
70	9/5/97	CERTIFICATION of Notice by plaintiff to opposing counsel pursuant to Rule 65(b) (no pgs: 2) (wh)
71	9/5/97	AFFIDAVIT of Frederick M Gittes regarding motion for temporary restraining order [69-1] (no pgs: 5) (wh)
72	9/5/97	ORDER by Judge James L. Graham granting motion for temporary restraining order [69-1] by pltf. with the posting of the $1,000.00 bond. (cc: all counsel) (no pgs: 2) (br) [Entry date 09/09/97]
73	9/8/97	ORDER by Judge James L. Graham In-court hearing on the motion for pltf. for summary judgment is set at 1:00 on 1/12/98 (cc: all counsel) (no pgs: 2) (br) [Entry date 09/09/97]
--	9/9/97	TRANSCRIPT filed of the 9-5-97 proceedings (br)
74	9/10/97	LETTER to Clerk from the US Supreme Court re: ext of time for a petition for a writ of certiorari. (br)
--	10/9/97	TRANSCRIPT filed of the Sept 5, 1997 proceedings (br) [Entry date 10/16/97]
75	10/28/97	MOTION by defendant Ohio Forestry Assoc to vacate the order of 9-8-97 () (br) [Entry date 10/29/97]
76	10/27/97	ORDER OF SUPREME COURT OF THE UNITED STATES: the petition for a writ of

		certiorari is granted(no pgs:1) (sm) [Entry date 10/29/97]
77	10/29/97	ORDER by Judge James L. Graham granting the parties motion to vacate the order of 9-8-97 [75-1] vacating [73-1] the Scheduling order of 9-8-97 (cc: all counsel) () (br) [Entry date 10/30/97]
78	10/31/97	ORDER OF SUPREME COURT OF US: writ of certiorari is GRANTED (no pgs: 1) (sm)

General Docket
Sixth Circuit Court of Appeals

Court of Appeals Docket #: 94-3407

THE SIERRA CLUB; CITIZENS COUNCIL ON CONSERVATION AND ENVIRONMENTAL CONTROL

Plaintiffs - Appellants

v.

JACK WARD THOMAS, in his capacity as Chief of the United States Forest Service; MICHAEL ESPY, in his capacity as Secretary of Agriculture; FLOYD J. MARITA, in his capacity as Regional Forester, Eastern Region; EURIAL TURNER, in his capacity as Forest Supervisor, Wayne National Forest;

Defendants - Appellees

OHIO FORESTRY ASSOCIATION, INC.

Intervening Defendant - Appellee

RELEVANT DOCKET ENTRIES

Date	Description
4/18/94	Civil Case Docketed. Notice filed by Appellant Sierra Club, Appellant Citizens Cncl. Transcript needed: y (cf)
8/3/94	BRIEFING LETTER SENT brief returned to Frederick M. Gittes for Appellants Citizens Cncl, Sierra Club because of format (13 characters per inch; footnotes set in different font) [94-3407], resetting briefing schedule: appellant brief due

now 8/17/94; appellee brief now due 9/14/94; reply brief now due 9/28/94; appendix now due 10/5/94 [94-3407] (teb)

11/4/94 BRIEF filed by Frederick M. Gittes for Appellant Citizens Cncl, Appellant Sierra Club. Copies: 5. Certificate of service date 11/3/94 [94-3407] (vf)

11/15/94 BRIEFING LETTER SENT resetting briefing schedule: appellee brief now due 12/15/94; appendix now due 1/5/95 [94-3407] (mmd)

12/19/94 BRIEF filed by Elizabeth Ann Peterson for Appellee Eurial Turner, Appellee Floyd J. Marita, Appellee Michael Espy, Appellee Jack Ward Thomas. Copies: 5. Certificate of service date 12/15/94 [94-3407] (vf)

12/27/94 Appellee MOTION filed to adopt a brief previously filed by appellee, Espy, Marita and Turner. Motion filed by Stephen H. Dodd for Appellee Ohio Forestry Assoc. Certificate of serviced date 12/22/94. [94-3407] (mmd)

12/29/94 REPLY BRIEF filed by Frederick M. Gittes for Appellants Citizens Cncl, Sierra Club Copies: 5. Certificate of service date 12/28/94 [94-3407] (teb)

1/10/95 CERTIFIED RECORD filed: Volumes include 3 Pl (only). [94-3407] (tt)

1/19/95 APPENDIX filed by Frederick M. Gittes for Appellants. Copies: 5 (Vol. I - II). Certificate of service date 1/19/95 [94-3407- (vf)

9/1/95 ORDER filed directing the Department of Justice representing the United States Forest Service to file within ten day three copies of the Management Plan for the Wayne National Forest as finally approved. This should be contained in one complete document and should indicate that it was submitted in this form tot he district court. [1197170-1] [94-3407]. Entered by order of the court. (mmd)

9/18/95 Appellee MOTION filed for leave to file Management Plan out of time [1204339-1] Motion filed by Elizabeth Ann Peterson for Appellee Eurial Turner, Appellee Floyd J. Marita, appellee Michael Espy, Appellee Jack Ward Thomas [94-3407] (mmd)

9/22/95 RULING granting motion to file Management Plan out of time filed by Elizabeth Ann Peterson [94-3407] LG/mmd, per hearing panel on 9/21/95. (mmd)

10/12/95 CAUSED ARGUED on 10/12/95 by Frederick M. Gittes for Appellant Citizens Cncl, Appellant Sierra Club, Elizabeth Ann Peterson for Appellee Eurial Turner, Appellee Floyd J. Marita, Appellee Michael Espy, Appellee Jack Ward Thomas, James E. Melle for Appellee Ohio Forestry Assoc. before Judges Martin, Batchelder, Cool, [94-3407] (paw)

10/25/95 FILED: Proposed Land & Resource Management Plan for the Wayne National Forest and the Draft and Final Environmental Impact Statements for the Plan for Elizabeth Ann Peterson for Appellee

Eurial Turner, Appellee Floyd J. Marita, Appellee Michael Espy, Appellee Jack Ward Thomas [94-3407] (mmd)

1/21/97 OPINION filed: REVERSED and remanded [94-3407], decision for publication pursuant to local rule 24 [94-3407]. Boyce F. Martin, Authorizing Judge, Alice M. Batchelder, separate concurring opinion, Julian A. Cook, District Judge. (mmd)

1/21/97 JUDGMENT: REVERSED and remanded. (mmd)

3/4/97 PETITION for en banc rehearing filed by Thomas R. Lundquist and James E. Melle for Appellee Ohio Forestry Assoc. Certificate of service date 3/3/97. [94-3407] (blh)

3/7/97 ADDITIONAL PETITION for en banc rehearing filed by Elizabeth Ann Peterson for Appellees Jack Ward Thomas, Michael Espy, Floyd J. Marita, Eurial Turner. Certificate of service date 3/6/97. [94-3407] (blh)

4/7/97 ORDER filed denying petition for en banc rehearing [1481757-1] filed by Elizabeth Ann Peterson [94-3407], and a petition for en banc rehearing [1481044-1] filed by Thomas R. Lundquist and James E. Melle [94-3407]. Boyce F. Martin, Alice M. Batchelder, Circuit Judges; Julian A. Cook, District Judge. (blh)

4/15/97 MANDATE ISSUED with no cost taxed [94-3407] (vf)

4/25/97 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [94-3407]. Volumes included: 3 Pl; (dac)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Sierra Club and Citizens Council on Conservation and Environmental Control, Plaintiffs,	:	[Dated June 22, 1993]
	:	Case No. C2-92-249
vs.	:	JUDGE GRAHAM
F. Dale Robertson, in his capacity as Chief of the United States Forest Service, Edward Madigan, in his capacity as the Secretary of Agriculture, Floyd J. Marita, in his capacity as Regional Forester, Eastern Region, and Francis J. Voytas, in his capacity as Forest Supervisor, Defendants.	:	MAGISTRATE JUDGE ABLE
	:	SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JURISDICTION

1. The court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 2201, this being an action to preserve and protect the resources and wildlife of the Wayne National Forest under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, Title 16 U.S.C. section 1600 et seq.; the Multiple-Use Sustained-Yield Act of 1960, Title 16 U.S.C. section 528 et seq.; the National Environmental Policy Act, particularly Title

42 U.S.C. section 4332 and the Administrative Procedure Act, Title 5 U.S.C. sections 553 and 701 et seq.

PARTIES

2. The plaintiff, the Sierra Club, is a non-profit public interest organization concerned with preserving the Wayne National Forest (hereinafter,"Forest" or "Wayne") while enhancing its recreational, wildlife and other values through proper planning and management. The plaintiff Sierra Club is organized under the laws of California and has its principal place of business in California. The Sierra Club has 619,419 members nationally and its Ohio chapter had 17,647 members as of June, 1991.

3. The plaintiff, Citizens Council on Conservation and Environmental Control, is a non-profit unincorporated association concerned with preserving the Wayne while enhancing its recreational, wildlife and other values through proper planning and management. The Council's membership resides in Athens County and Hocking County, Ohio.

4. Members of the plaintiffs, especially in Ohio, regularly visit the Wayne for recreational purposes including hiking, bird watching and camping. Members also visit the Forest for their avocational, occupational and professional interests including scientific and scholarly pursuits. Members visit portions of the Forest which under the current management plan for the Forest have been or will be subject to clearcutting or other forms of logging of trees as a result of the defendants' unlawful practices regarding below cost timber sales.

5. The plaintiffs and their members have an interest in the enforcement and administration of the above-named Acts that extends beyond the generalized interest that all members of the public have in enforcement of the law. Final administrative

actions of the Forest Service, taken in contravention of existing law, work a direct injury upon the plaintiffs and their members by allowing damaging illegal and inefficient use of natural resources in national forest areas. Such actions by the defendants result in direct and substantial injury to the plaintiffs and their members by reducing their enjoyment of, and ability to use, the Wayne.

6. Defendants F. Dale Robertson, Floyd J. Marita, Edward Madigan and Francis Voytas are sued in their official capacities. Defendant Marita is the Regional Forester for the Eastern Division of the Forest Service which includes the Forest. Defendant Marita issued the Record Decision approving the plan at issue in this case. Defendants Robertson and Madigan are the Chief of the United States Forest Service and the Secretary of Agriculture, respectively, who have responsibility for formulating and implementing Land and Resource Management Plans for the nation's national forests as well as ensuring that these plans and Forest Service actions comply with the law. Defendant Francis Voytas is the Forest Supervisor of the Wayne and has primary responsibility for implementing the plan, including the below-cost timber sales and clearcutting of old growth forest areas.

THE ADMINISTRATIVE APPEAL

7. On January 4, 1988, Defendant Marita issued a record decision adopting a ten year plan for the Forest as required by Title 16 U.S.C. Section 1600 et seq. The decision followed a planning process beginning in 1986 in which the plaintiff, through its Ohio Chapter, and other similarly interested parties submitted comments and proposals to the Forest Supervisor regarding the plan favored and eventually adopted by the defendants.

8. While minor adjustments in the plan were made in response to the comments of the plaintiff and others, the most serious objections raised during the planning process were disregarded and not adequately addressed in the final plan as adopted by defendant Marita in his decision of January 4, 1988.

9. The plan adopted by defendant Marita, as subsequently approved, controls all management and policy decisions for the Forest until a subsequent plan is approved as a matter of law. As a matter of practice the current plan will significantly and materially impact on future planning processes as a reference point for any future plans. The implementation of the plan will, of necessity, affect future options.

10. On February 16, 1988, the plaintiff Sierra Club appealed defendant Marita's decision, to defendant Robertson pursuant to the applicable regulations. On November 14, 1990, the appeal was denied and the plan affirmed. Defendant Robertson's decision became a final administrative decision of the Department of Agriculture when defendant Madigan elected not to review the matter within ten days of its receipt.

11. On February 18, 1988, plaintiff, the Citizen's Council, appealed defendant Marita's decision to defendant Robertson pursuant to the applicable regulations. On April 15, 1988, the Council submitted its statement of reasons in support of its appeal. Defendant Marita did not file the required responsive statement to the plaintiff Council's submission until May 4, 1989, over a year later. On May 27, 1989, the plaintiff Council filed its reply to defendant Marita's responsive statement. However, no decision was forthcoming.

12. On September 25, 1991, the plaintiff Council wrote the defendant demanding a decision. On November 12, 1991,

defendant Robertson, through his agent, responded that a decision could be expected within 45 days. On March 26, 1992, after the filing of this action, a decision denying plaintiff Council's appeal was served on the plaintiff.

FACTS

13. According to records of the Forest Service related to the plan, the Wayne National Forest unit includes within its boundaries 832,603 acres, but only 202,967 acres of the area is National Forest belonging to the federal government as the Forest unit boundaries contain land belonging to both the private and public sector of Ohio.

14. Located in the hill country of southeastern Ohio, the Wayne's lands are characterized by narrow ridge tops, steep slopes and narrow valleys. These characteristics make much of the Wayne physically and economically unsuitable for timbering, particularly clearcutting which involves cutting all saleable and unsaleable trees in large tracts within designated management areas of the Forest. These characteristics adversely affect the cost and difficulty of building the roads necessary for the cutting and removal of the trees as well as the degree of damage caused by erosion and water run-off associated with clearcutting and road construction in forests.

15. Public lands available for recreation comprise less than 4% of the State of Ohio. Although it is one of the smaller national forests in the country, the Wayne comprises 24% of the public land with wildlife value in this state.

16. The Wayne represents one of the few areas of relatively extensive, continuous forest growth in Ohio and contains a substantial portion of the old-growth forest in the state. The defendants' own studies indicate that there will be an overall

loss in forest wildlife habitat in the State as a whole in the future.

17. Under the forest plan adopted by the defendants, almost seventy per cent (70%) of the Wayne has been designated as suitable for timber production. The plan authorizes sale of 75 million board feet over the life of the plan with an annual allowable sale quantity of 7.5 million board feet.

18. The primary method under the plan for taking the forest's trees for sale is clearcutting, a method disfavored by law and regulation and subject to special requirements particularly when undertaken in connection with below cost timber sales. The plan reserves approximately 120,000 acres for so-called even-aged management, mostly clearcutting. Upon information and belief, this represents 80% of the timber base.

19. To facilitate the timber removal the plan allows annual construction of new permanent roads, reconstruction of existing road and construction of temporary roads.

20. Because of the extensive private and state holdings within the boundaries of the Wayne, there already exist approximately 300 miles of state, county and township roads within the Forest. In addition there are approximately 250-300 miles of mineral access roads along with 500 to 1,000 miles of **unsurfaced** roads. All of these roads are exclusive of roads built by the Forest Service. The defendants failed to adequately consider the extensive **roaded** areas on private and state lands which coexist with the Wayne. The defendants failed to adequately consider the cumulative environmental and visual impact of the planned new road construction.

21. The timber sales under the plan approved by the defendants are below cost sales. Taxpayers are subsidizing the

sale of timber from the Wayne to commercial interests because the defendants are unreasonably, unnecessarily and arbitrarily permitting excessive timbering of the Forest at a loss to the government.

22. In Fiscal Year 1987 total revenues for timber sales in the Wayne were $480,876 while expenses and payments to the states totaled $718,525. In that fiscal year revenues were approximately 67% of costs. In fiscal Year 1988, revenues were $858,017 while expenses and state payments were $1,192,850 meaning revenues were only 72% of costs that year. In fiscal year 1989 revenues were $838,366 while expenses and state payments were $1,074,113 meaning revenues were only 78% of costs that year. Similarly, in fiscal year 1990 revenues were $469,751 while expenses and state payments were $632,757 meaning revenues were 74% of costs.

23. Most of the land designated as suitable under the plan will continue to lose money in connection with timber sales. Furthermore, the forest service analysis of costs is inadequate and misleading for among other reasons, it does not account for the cost of building roads to access timber or administrative overhead, thereby underestimating the cost of the timber program.

24. When doing the economic suitability analysis, defendants violated section 6(k) of the NFMA. Contrary to the requirements of section 6(k), the defendants ignored relevant economic information, selected harvest levels first, and then excluded from the suitable timber base only those lands not needed to meet the predetermined harvest levels. As a result, harvest levels, not economic considerations, dictated the timber base, and economically unsuitable lands were included in the base.

25. The plan adopted by the defendants is unlawful and arbitrary and capricious because, among other reasons:

(a) the plan places the objective of timber harvesting above all other uses;

(b) the plan fails to meet the "suitability" requirement for timber harvest planning by designating economically and environmentally unsuitable lands for timbering;

(c) the plan lacks site-specific determinations that clearcutting is the "optimal" method of harvesting timber in the Wayne;

(d) the plan fails to demonstrate the **optimality** of clearcutting as the method of harvesting timber for the Wayne as a whole;

(e) the plan fails to demonstrate that timber harvest will be cost effective and omits any site specific analysis to determine cost effectiveness;

(f) the plan fails to demonstrate that the non-timber use benefits alleged to be achieved through the timber program are really needed.

26. The defendants, arbitrarily and unlawfully, attempted in the plan to justify below cost timber sales by assigning a positive economic value to certain alleged non-economic intangible benefits, particularly wildlife diversity, purportedly associated with the timbering allowed by the plan.

27. The defendants represent in the plan that the timber harvest will benefit wildlife diversity by increasing the early successional habitat (characterized by younger growth, more open uncanopied areas and edging) within the federally owned portions of the Wayne. This, according to the plan, will promote certain types of wildlife associated with early successional habitats.

28. The defendants arbitrarily and unlawfully disregarded the conditions surrounding the federal holdings in the Wayne which were disclosed in the planning documents as well as the administrative process.

29. Currently, mature, old growth forest with continuous **unopen** canopy is in short supply in Southeastern Ohio and the rest of the state. The maturing, natural forest areas in the Wayne provide much needed habitat for numerous plant and animal species requiring late successional conditions.

30. There is already an ample supply of early successional habitat in the area of and around the Wayne. Wildlife that requires early successional conditions are overly abundant in the region, a case in point being the white tailed deer. The defendants' planning documents disclose that much of the non-federal land in the area is habitat similar to early successional, whereas 170,220 acres of federal lands are in forest (at various stages of maturity). 77% of the federal lands in the Wayne would have to be deforested to achieve the same amount of open habitat that already exists in the surrounding area.

31. The defendants' failure to properly consider the lands surrounding the Wayne in assigning positive economic values to intangible benefits purportedly to be gained from clearcutting was arbitrary and a major plan defect. The planning deficiency was worsened by the absence of any data derived from study of the Wayne itself pertaining to wildlife and recreation values.

32. The estimated values in the planning documents relating to wildlife and recreation used to justify below-cost sales were not adjusted for local recreational conditions on the Wayne. Instead, values applicable to the 20-state Eastern Region of the Forest Service were used. The Eastern Region stretches from

the Maine Woods to the Ozarks, from the Boundary waters to the Chesapeake Bay. An index of demands for the Region as a whole cannot accurately reflect the local circumstances surrounding the Wayne.

33. Aside from arbitrarily and capriciously assigning positive economic values to the effects of timbering on biological diversity and recreation, the defendants failed to adequately consider or value the detrimental effects of the below-cost timber sales on these and other uses of the Forest which by law are to be given equal weight with timber production.

34. The defendants' plan will actually reduce wildlife diversity by allowing timbering, particularly clearcutting, to disrupt, reduce and fragment the late successional, old growth forest available in Ohio while adding to the overabundance of early successional habitat in the Wayne area.

35. The defendants' plan will actually reduce recreational opportunities in the Wayne. Currently, the Wayne only meets 40% of the demand for primitive forest. The plan adopted by the defendants will reduce the availability of primitive forest.

36. The defendants' plan also arbitrarily assigns positive values for alleged benefits to the local economy from below-cost timber sales. In fact, the plans for below-cost timber sales are detrimental to the local economy which increasingly benefits from tourism associated with the Wayne. The Wayne constitutes a unique recreational opportunity for Ohio and it is ideally located for access by those living in Ohio's major urban areas.

37. In Southeast Ohio the use of land for urban and agricultural purposes has been accompanied by exploitation for purposes of mineral extraction and timbering. Large sections

of land have been devoted to strip mining; oil and gas development has also expanded greatly in the past decade. Timber production has occurred on both public and private lands. Despite liberal use of the land in Southeast Ohio for these primary industries, the regional economy is among the worst in the State. Extraction and exploitation have not proven to be reliable sources of stable income or employment. Yet, in disregard of these facts, the defendants justify the below cost sale of timber, in part, as purportedly necessary for the local economy. The defendants know or should know that preservation of the timber base by limiting below cost timbering will better serve the local economy. The unique recreational opportunities offered by the wayne's mature old growth forest will provide greater economic benefits to the local community.

38. The mineral exploitation in the area of the Wayne has already severely and adversely affected the water supply in the region. The clearcutting under the plan and associated road building will cause increased water run-off during periods of heavy rains and result in increased sedimentation adversely affecting the watershed. The plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plans' impact on water resources. Watershed protection is lacking in the plan as is sufficient discussion of whether there is any current technology which can mitigate the plans' effect on water resources.

39. The plan fails to contain adequate analysis and/or data concerning sewage and other waste associated with proposed developed and recreation sites.

40. The plan fails to consider the impact of mineral and oil extraction activity and recent court decisions affecting these activities, on the forest and suitable timber base. The plan and

its environmental impact statement fails even to assess the cumulative impact of the extensive coal mining, particularly strip mining, which has been permitted in and around the Wayne for many years.

41. The forest service used a computer program known as FORPLAN to develop the plan for the Wayne.

42. The manner in which the forest service utilized FORPLAN was arbitrary and capricious.

43. The FORPLAN program which the forest service used to develop the plan for the Wayne included numerous false and unjustified assumptions which arbitrarily biased the plan in favor of timbering. These assumptions include but are not limited to the assumption that recreation can only occur when timbering occurs.

44. Such analysis as exists in the plan for estimating demand for uses of the forest is arbitrary and unreasonable.

45. The plan and associated Environmental Impact Statements fail to adequately document the demands for resources and uses upon which the plan is premised.

46. The plan fails to disclose widely held scientific beliefs and/or results of significant scientific research contrary to the assumptions and premises upon which the plan was based.

47. Under NFMA, see 36 C.F.R. §219.12(f), and NEPA, 40 C.F.R. §1502.14, a reasonable and broad set of alternatives are required to be considered a part of the planning process. The defendants failed to present a reasonable and broad set of alternatives.

FIRST CLAIM FOR RELIEF

48. Paragraphs one through forty-seven are realleged and incorporated herein.

49. The actions of the defendants in approving the plan for the Wayne and in directing or permitting below-cost timber sales accomplished by means of clearcutting are in violation of the provisions of federal law enumerated in paragraph one of this complaint. The actions of the defendants threaten imminent and irreparable harm to plaintiff's interests in the use and enjoyment of national and wilderness resources and plaintiff's interests can only be protected by a declaration that the existing plan for the Wayne is inconsistent with law accompanied by an injunction prohibiting further timber sales and clearcutting until the plan and its environmental impact statement are revised, subject to public and administrative review, to bring them into conformity with law.

SECOND CLAIM FOR RELIEF

50. Paragraphs one through forty-seven realleged and incorporated herein.

51. All of the public lands held by the federal government, including the national forests, are held in trust for the people of the United States. This trust responsibility extends to agencies which administer federal governmental policies and programs concerning such public lands.

52. The defendants' actions in directing or permitting below-cost timber sales in the Wayne under the plan violate the defendants' duties as public trustees.

THIRD CLAIM FOR RELIEF

53. Paragraphs one through forty-seven are realleged and incorporated herein.

54. The planning regulations, 36 C.F.R. section 219.14 (1991), provide for a three-level suitability analysis. Stage I provides for the removal of lands from the base prior to the selection harvest levels based on physical characteristics, but it does not include consideration of economic factors.

55. Stage II (section 219.14(b)) requires an analysis of the financial costs and returns of lands with similar characteristics. The regulation requires a comparison of the direct costs of harvesting timber with the direct benefits. This exercise, however, does not result in any lands being designated as not suited for timber production, regardless of how much money those lands would lose on timber production.

56. Under Stage III (section 219.14(c)), the objectives, including the harvest level, of the planning alternatives are selected. Only land that is not needed to meet the harvest level objective is then classified as not suitable. Planning alternatives with higher levels demand larger suitable timber bases.

57. Most of the land on the Wayne will continue to lose money under the foreseeable future in conditions. Following the regulations, the defendants did not remove economically unsuitable lands from the timber base using this information.

58. Under Stage III, the defendants developed forest management alternatives selecting harvest levels without regard to the economics of the land on the Wayne. Following the regulations, the Forest Service designated as not suitable for

timber production only land that was not needed to meet the harvest level.

59. Section 6(k) of the NFMA requires the identification of lands economically not suited for timber production. This identification must be based on an objective standard or rule of reason that eliminates uneconomic lands from the timber base independent of timber harvest levels. Contrary to section 6(k), the suitability regulations do not provide an objective standard or rule of reason for identifying economically unsuitable lands independent of, and prior to, the selection of harvest levels. As a result, the regulations allow harvest levels rather than economic considerations to dictate the suitable timber base.

60. Therefore, the NFMA suitability regulations, 36 C.F.R. section 219. (1991), violate section 6(k) of the NFMA and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, as set forth in the APA, 5 U.S.C. section 706(2).

WHEREFORE, the plaintiff requests:

a) that the Court declare that the plan adopted by the defendants is unlawful as are the below-cost timber sales and timbering, including clearcutting, authorized by the plan; and

b) that the Court issue a preliminary and permanent injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan has been revised in accordance with law, subject to public and administrative review; and

c) that the plaintiff recover from the defendants its costs, including reasonable attorneys fees, as provided for under the Equal Access to Justice Act, Title 28 U.S.C. section 2412(D) and any other applicable law; and

d) that the Court order such other further relief as may be appropriate.

Respectfully submitted,

/s/Frederick M. Gittes
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